Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

C.E. and L.E.,

Petitioners,

v.

ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Can a state's *parens patriae* interest outweigh a person's fundamental right to refuse psychotropic medication when that person has a mental illness or developmental disability and lacks decisional capacity but poses no threat of harm?

II. Does a state violate the guarantee of equal protection by creating two disparate judicial procedures to make treatment decisions for persons who lack decisional capacity?

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C.E. and L.E. respectfully petition for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 161 Ill. 2d 200, 641 N.E.2d 345 (1994). It has been reprinted and attached hereto as Appendix A. The opinion of the Circuit Court of Cook County, Illinois, is unreported. It has been reprinted and attached hereto as Appendix B.

JURISDICTION

The Illinois Supreme Court entered its judgment on May 19, 1994. On October 3, 1994, the Court entered an order denying C.E.'s Petition for Rehearing. That order is attached hereto as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

Section 2-107.1 of the Illinois Mental Health and Developmental Disabilities Code:

Psychotropic medication may be administered to a recipient of services against his will under the standards and procedures of this Section:

(a) Any person 18 years of age or older, including any guardian, may petition the circuit court for an order authorizing the administration of psychotropic medication to a recipient of services.

(b) The court shall hold a hearing within 30 days of the filing of the petition.

(c) Unless otherwise provided herein, the procedures set forth in Article VIII of Chapter 3 of this Act, including the provisions regarding appointment of counsel, shall govern hearings held under this Section.

(d) Psychotropic medication shall not be administered to the recipient unless it has been determined by clear and convincing evidence that all of the following factors are present:

(1) That the recipient has a serious mental illness or developmental disability.

(2) That because of said mental illness or developmental disability, the recipient exhibits deterioration of his ability to function, suffering, or threatening or disruptive behavior.

(3) The illness or disability has existed for a period marked by the continuing presence of the symptoms set forth in paragraph (2) of subsection (d) of this Section or the repeated episodic occurrence of these symptoms.

(4) That the benefits of the psychotropic medication will outweigh the harm.

(5) That the recipient lacks the capacity to make a reasoned decision about the medication.

(6) That other less restrictive services have been explored and found inappropriate.

(e) In no event shall an order issued under this Section be effective for more than 90 days. However, psychotropic medication may be administered for additional 90-day periods without limitation under hearings that comply with the above standards and procedures of this Section.

(f) An order issued under this Section shall designate the persons authorized to administer the psychotropic medication under the standards and procedures of this Section.

(g) A guardian shall only be authorized to consent to the administration of psychotropic medication under the standards and procedures of this Section.

(h) Nothing in this Section shall prevent the administration of psychotropic medication to recipients in an emergency under Section 2-107 of this Act. 405 ILCS 5/2-107.1 (West 1992).

STATEMENT OF THE CASE

C.E., a legally competent adult, was named the respondent in a petition for the involuntary administration of psychotropic medication. If the Circuit Court of Cook County, Illinois, had granted that petition, C.E. would have been denied his right to refuse unwanted, non-emergency medical treatment. He seeks to have declared unconstitutional Section 2-107.1 of the Illinois Mental Health and Developmental Disabilities Code (hereinafter "the Code") which authorizes the entry of a court order for the involuntary administration of psychotropic medication to certain persons with mental illnesses or developmental disabilities.

Psychotropic Medication

As defined by the Code, psychotropic medications are any drugs which are used for "antipsychotic, antidepressant, antimanic, antianxiety, behavioral modification or behavioral management purposes." 405 ILCS 5/1-121.1 (West 1992). Although Section 2-107.1 permits the involuntary administration of any of the myriad of psychotropic medications, most litigation in this area has focused on one subgroup of psychotropic medications—antipsychotic medications.

Antipsychotic medications are mind-altering drugs. *Mills v. Rogers*, 457 U.S. 291, 293 n.1 (1982). They "alter the chemical balance in a patient's brain, leading to changes,

intended to be beneficial, in his or her cognitive processes." *Washington v. Harper*, 494 U.S. 210, 229-230 (1990). Some of the cognitive changes brought on by antipsychotic medications, however, may not be beneficial. Antipsychotic drugs can cause sedation and confusion, thereby hindering concentration. *Riggins v. Nevada*, 112 S. Ct. 1810, 1816 (1992). They may also "undermine the foundation of personality," *In the Matter of Guardianship of Roe*, 383 Mass. 415, 437, 421 N.E.2d 40, 53 (1981), decreasing "the desire for self-preservation" and "imposing constraints on the [patient's] own will." *Riggins*, 112 S. Ct. at 1819-1820 (Kennedy, J., concurring).

Antipsychotic drugs can attack the patient's physical being, as well, causing "serious, even fatal, side effects." *Harper*, 494 U.S. at 229. The drugs' effects on the autonomic nervous system include postural hypotension, dry mouth, nasal congestion, nausea, blurred vision, constipation, and, in men, retrograde ejaculation which may lead to impotence. Their effects on the central nervous system include dystonic reactions (severe muscle spasms in the upper body, tongue, throat, or eyes), pseudoparkinson reactions (diminished range of facial expression, tremors, stooped posture, and shuffling gait), and akathisia (an inner-driven restlessness which may lead to rhythmic leg-jiggling or agitated, hand-wringing pacing). *See Harper*, 494 U.S. at 229-230 and 240 (Stevens, J., dissenting); *Riggins*, 112 S. Ct. at 1819-1820 (Kennedy, J., concurring).

Antipsychotic drugs can cause tardive dyskinesia, a potentially irreversible syndrome of involuntary muscle movements. Its characteristic, and uncontrollable, movements include facial grimacing, lip puckering, tongue darting, pelvic thrusting, and any variety of arm, shoulder, and leg movements. According to this Court, "the evidence suggests that the proportion of patients treated with antipsy-

chotic drugs who exhibit the symptoms of tardive dyskinesia ranges from 10% to 25%." *Harper*, 294 U.S. at 230. Antipsychotic drugs can also cause neuroleptic malignant syndrome, a relatively rare condition, but one which can lead to death from cardiac dysfunction. *Harper*, 294 U.S. at 229.

Because of the "well-established likelihood of severe and irreversible adverse side effects," some state and federal courts have found that psychotropic medications are as intrusive and as dangerous as electroconvulsive therapy or psychosurgery. *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984); *Roe*, 383 Mass. at 436, 421 N.E.2d at 53; *In re K.K.B.*, 609 P.2d 747 (Okla. 1980). Yet it is these medications which the State of Illinois, through the enactment of Section 2-107.1, seeks to forcibly administer to certain persons with mental illnesses or developmental disabilities—whether they are competent or incompetent, whether they are dangerous or not dangerous, whether they are inpatients, outpatients, or ex-patients,[1] and whether they like it or not.

Illinois's Statutory Right to Refuse Treatment and its Exceptions

In Illinois, adults, or their guardians, have long had a statutory right "to refuse generally accepted mental health or developmental disability services, including but not limited to medication." 405 ILCS 5/2-107 (West 1992). Until 1991, this statutory right had but two exceptions: (1)

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[1] Section 2-107.1 authorizes the involuntary administration of psychotropic medications to certain "recipients of services." A recipient of services is "a person who has received or is receiving treatment or habilitation" for a mental illness or a developmental disability. 405 ILCS 5/1-123 (West 1992). Treatment "includes, but is not limited to, hospitalization, partial hospitalization, outpatient services, examination, diagnosis, evaluation, . . . psychotherapy, [and] pharmaceuticals." 405 ILCS 5/1-128 (West Supp. 1993).

adults, who had been adjudicated incompetent and for whom guardians had been appointed, could not refuse treatment for themselves and (2) adults, who, in emergency situations, posed an immediate threat of serious physical harm to themselves or others, could not refuse treatment. *In the Matter of Orr*, 176 Ill. App. 3d 498, 531 N.E.2d 64 (4th Dist. 1988).

On August 13, 1991, Section 2-107.1 of the Code became effective and created a third exception to the right to refuse. Section 2-107.1 authorizes the entry of a court order for the administration of psychotropic medication to persons with mental illnesses or developmental disabilities—despite their refusal—upon a showing, *inter alia*, that (1) the person "lacks the capacity to make a reasoned decision about the medication;" (2) the person "exhibits deterioration of his ability to function, suffering, or threatening or disruptive behavior;" and (3) "the benefits of the psychotropic medication will outweigh the harm." 405 ILCS 5/2-107.1 (West 1992).

Proceedings in the Trial Court

In late August 1991, C.E. was found to be subject to involuntary admission by the Circuit Court of Cook County and was ordered hospitalized for psychiatric treatment.[2] At

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[2] Section 1-119 of the Code defines "subject to involuntary admission" as follows:

> (1) A person who is mentally ill and who because of his illness is reasonably expected to inflict serious physical harm upon himself or another in the near future; or
>
> (2) A person who is mentally ill and who because of his illness is unable to provide for his basic physical needs so as to guard himself from serious harm.

405 ILCS 5/1-119 (West Supp. 1993).

a separate hearing that same day, C.E.'s father, L.E., was appointed his temporary guardian for the purpose of granting or withholding substituted informed consent for medical treatment, including psychotropic medication, for C.E.[3] Pursuant to Section 2-107.1, L.E. filed a petition requesting authority to consent to psychotropic medication which C.E. had refused. Soon thereafter, L.E. filed a Petition for Declaratory Relief, asking that Section 2-107.1 be declared unconstitutional. The Illinois Guardianship and Advocacy Commission, court appointed counsel for C.E., also filed a Petition for Declaratory Relief, asking that the statute be declared unconstitutional. The Office of the Illinois Attorney General filed an appearance on behalf of the Illinois Department of Mental Health and Developmental Disabilities and defended the statute's validity.

In March 1992, the trial judge granted C.E.'s and L.E.'s Petitions for Declaratory Relief and declared Section 2-107.1 unconstitutional on its face. Finding that the right to refuse treatment is a fundamental right and employing strict scrutiny, the trial judge held that Section 2-107.1 violates both state and federal constitutional guarantees of

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[3] *See* 755 ILCS 5/11a-3 (West 1992) (temporary guardian may be appointed "prior to the appointment of a [limited or plenary] guardian . . . upon a showing of the necessity therefor for the welfare and protection of the disabled person or his estate. . . . The temporary guardianship shall expire within 60 days after the appointment or whenever a guardian is regularly appointed, whichever occurs first.").

C.E. was not found to be incompetent. (Appendix B-29 and B-32) Neither an adjudication of being subject to involuntary admission nor the appointment of a temporary guardian constitutes an adjudication of legal incompetence. 405 ILCS 5/2-101 (West 1992) (judicial determination of incompetence "shall be separate from a judicial proceeding held to determine whether a person is subject to involuntary admission"). *See also* 755 ILCS 5/11a-12, 11a-14 (West 1992).

due process, equal protection, privacy, and freedom of religion. The Attorney General took a direct appeal to the Illinois Supreme Court.

Opinion of the Illinois Supreme Court

In May 1994, the Illinois Supreme Court reversed the trial court and upheld the validity of Section 2-107.1. The court found that persons have a liberty interest in refusing unwanted medical treatment which is protected by the Fourteenth Amendment to the United States Constitution, (Appendix A-10), and that the State has a competing and "significant *parens patriae* interest in providing for persons who, while suffering from a serious mental illness or developmental disability, lack the capacity to make reasoned decisions concerning their need for [psychotropic] medication." (Appendix A-15) Finding that Section 2-107.1 "bears an important and substantial relationship to the State's interest as *parens patriae*," (Appendix A-15), the court held that the statute "does not, on its face, impermissibly burden the Federal constitutional liberty interests of C.E." (Appendix A-17) The court cited no opinions from any jurisdiction which had allowed the State's *parens patriae* power to outweigh an individual's federal right to refuse treatment, and, despite C.E.'s entreaty to do so, the court did not determine whether the right to refuse is a fundamental right and did not specify the level of scrutiny employed.

Based on *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), C.E. and L.E. had argued that Section 2-107.1 is unconstitutional because it does not require use of the substituted judgment standard. Under this standard, if a patient is found to lack decisional capacity, a surrogate decision maker is appointed to effectuate the treatment decision that the incompetent patient would make if competent. The Illinois Supreme Court found that

a patient's "wishes, while competent, will often be very relevant to a determination of whether psychotropic substances should be administered." (Appendix A-21) Because Section 2-107.1 "permits the court's consideration of the substituted judgment" standard, (Appendix A-19), the court found "no error, under Federal constitutional law, in the legislature's failure to expressly include the substituted judgment test in section 2-107.1." (Appendix A-21) The court did not, however, discuss *Cruzan* and did not *require* use of the substituted judgment standard in hearings held pursuant to Section 2-107.1.

C.E. and L.E. had also challenged Section 2-107.1 as a violation of equal protection. They had argued that Section 2-107.1 hearings and guardianship hearings both accomplish the same end—making treatment decisions for persons who lack decisional capacity—but that they do so through disparate means: Section 2-107.1 hearings require fewer procedural protections than guardianship hearings.

The Illinois Supreme Court recognized that the guardianship statute's definition of a "disabled person"[4] "bears substantial similarity" to 2-107.1's requirement that respondents lack decisional capacity, (Appendix A-30), and then compared the procedures that these two groups of similarly situated persons receive under the two statutes. When making this comparison, however, the court ignored most of the differences between the two statutes articulated by C.E. and L.E. and mentioned only one—the appointment of a guardian. The court noted that "there is nothing in section 2-107.1 that prevents or prohibits the trial court from

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[4] A "disabled person" is one who, because of mental deterioration, physical incapacity, mental illness, or developmental disability is not fully able to manage his person or estate. 755 ILCS 5/11a-2 (West Supp. 1993).

appointing a guardian . . . if the trial court believes such appointment would serve the mental health recipient's interests." (Appendix A-30) "We cannot say that section 2-107.1 is unconstitutional for its failure to explicitly *require* such guardianship appointments in all instances." (Appendix A-31)

Upholding the statute's validity, the court reversed the judgment of the trial court and, because no hearing had yet been held on the original petition for involuntary medication, remanded the cause "for further proceedings consistent herewith." (Appendix A-31) C.E. filed a timely Petition for Rehearing, asking, *inter alia*, for guidance regarding the discretionary use of substituted judgment. That Petition for Rehearing was denied on October 3, 1994. (Appendix C-1)

Jurisdiction

Although the Illinois Supreme Court remanded this case to the Circuit Court for further proceedings, its judgment is final regarding the federal issues raised. Thus, this Court may exercise its jurisdiction in this case despite the remand.

In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), this Court outlined four categories of cases in which this Court may exercise its jurisdiction without awaiting the completion of proceedings pending in the lower court.

> [In one] category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case.

Cox, 420 U.S. at 481.

In the present case, regardless of who prevails on the non-federal issues to be decided by the Circuit Court, this

Court will have no second opportunity to review the federal issues. This Court has jurisdiction to review only decisions of the Illinois Supreme Court, not decisions of the Circuit Court, and res judicata would bar C.E. from relitigating the federal issues in the Illinois Supreme Court.

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue . . .

Cox, 420 U.S. at 482-483.

In the present case, if this Court exercises its jurisdiction now and reverses the Illinois Supreme Court's decision on federal grounds, there would be no further litigation, and C.E.'s right to refuse treatment would be upheld. On the other hand, if this Court declines to exercise its jurisdiction, the federal policy of protecting an individual's right to refuse treatment—a policy recognized in *Harper*, *Cruzan*, and *Riggins*—could be seriously eroded, not just for C.E., but for countless individuals falling under the purview of Section 2-107.1 and similar statutes from states across the country.

REASONS FOR GRANTING THE PETITION

I.

IN *MILLS v. ROGERS*, THIS COURT GRANTED CERTIORARI TO ESTABLISH SUBSTANTIVE DUE PROCESS STANDARDS FOR REVIEWING CHALLENGES TO THE INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATION, BUT THIS COURT HAS NOT YET ESTABLISHED THOSE STANDARDS FOR PERSONS WHO ARE NOT IMPRISONED, AND, LACKING GUIDANCE, THE CIRCUIT COURTS OF APPEALS ARE IN CONFLICT REGARDING THIS IMPORTANT FEDERAL ISSUE.

In 1981, this Court granted certiorari to determine "whether an involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs." *Mills v. Rogers*, 457 U.S. 291, 298 (1982). If such a right existed, the parties asked the Court to determine whether it was fundamental and to identify conditions under which it could be outweighed by competing State interests. *Mills*, 457 U.S. at 299. This Court, however, did not make the requested determinations. Instead, the case was remanded to the Circuit Court of Appeals and was decided there solely on the basis of state law. *Rogers v. Okin*, 738 F.2d 1 (1st Cir. 1984). More than a decade later, most of the federal questions raised in *Mills* remain unanswered and are the subject of continuing debate by legal, and medical, experts. *See* Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 La. L. Rev. 283 (1992). The present case affords this Court the opportunity to clarify the relative importance of the individual's right to refuse treatment and the State's duty to provide treatment to persons with mental illnesses and developmental disabilities.

On the same day that *Mills* was remanded, this Court decided *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, this Court held that an adult with profound

mental retardation, who had been involuntarily committed to a state institution, retained a liberty interest in being free from unreasonable physical restraints. Physical restraints would be unreasonable, and therefore unconstitutional, however, only if the decision to use them was "a substantial departure from accepted professional judgment." *Youngberg*, 457 U.S. at 323.

Although *Youngberg* addressed the use of physical restraints for persons with mental retardation, some federal courts used *Youngberg*'s professional judgment standard to review the use of involuntary medication for persons with mental illnesses. Without identifying the weight of the individual's right to refuse, but using terms associated with the rational or reasonable basis test of minimum scrutiny, some courts have given the states' mental health professionals broad discretion to involuntarily medicate their patients. *See e.g. Dautremont v. Broadlawns Hospital*, 827 F.2d 291, 300 (8th Cir. 1987) (involuntary patient's "liberty [interest in refusing medication] is outweighed . . . by the government's legitimate objective to return [his] behavior to that which is acceptable to society and by the professionals' reasonable judgment . . . that that objective can best be accomplished by the administration of . . . psychotherapeutic drugs"); *Johnson v. Silvers*, 742 F.2d 823, 825 (4th Cir. 1984) (" 'the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.' ") (quoting *Youngberg*, 457 U.S. at 321.)

Distinguishing *Youngberg*, and using terms associated with strict scrutiny, other federal courts have given more weight to the individual's interest and less discretion to the states' officials. For example, the Tenth Circuit held that the right to refuse is fundamental. *Bee v. Greaves*, 744 F.2d

1387 (10th Cir. 1984). As a result, the Court permitted the involuntary administration of antipsychotic medications to pre-trial detainees only in emergency situations and only after less restrictive alternatives had been ruled out. The Tenth Circuit distinguished *Youngberg* because that case "involved temporary physical restraints rather than mental restraints [i.e., antipsychotic medications] with potentially long term effects." *Bee*, 744 F.2d at 1396 n. 7. *See also Rennie v. Klein*, 653 F.2d 836, 843-844 (3d Dist. 1981) (right to refuse is fundamental), *vacated*, 458 U.S. 1119 (1982), *reaffirmed on remand*, 720 F.2d 266, 269 (3d Cir. 1983) (antipsychotic drugs may be constitutionally administered over the objection of an involuntary patient only when "necessary to prevent the patient from endangering himself or others").

Thus, as the Seventh Circuit has recently noted, the opinions from the Circuit Courts of Appeals are "conflicting," and the contours of the constitutional right to refuse psychotropic medication have never been "clearly established." *Sherman v. Four County Counseling Center*, 987 F.2d 397, 408 (7th Cir. 1993).

In 1990, this Court issued two opinions regarding the right to refuse medical treatment, but neither opinion answered the questions first raised in *Mills*. In *Washington v. Harper*, this Court held that an incarcerated felon has a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Washington v. Harper*, 494 U.S. 210, 221 (1990). "Given the requirements of the prison environment," however, the Due Process Clause permits the State to administer antipsychotic medications to the inmate, against his will, if he is dangerous and if the treatment is in his medical interests. *Harper*, 494 U.S. at 227. *Harper* verified the existence of

the right to refuse. It did not, however, determine whether the right to refuse is fundamental, and it did not determine which State interests, outside the prison setting, could outweigh the individual's interest.

Harper did little to eliminate the confusion existing in the Courts of Appeals regarding the rights of non-prisoners to refuse psychotropic medication, and this Court's other 1990 opinion may have added to the confusion. In *Cruzan v. Director, Missouri Department of Health*, this Court addressed the right of an incompetent adult to refuse life-sustaining treatment. In so doing, this Court explicitly declined to rely on *Youngberg*, distinguishing *Youngberg* because it "did not deal with decisions to administer or withhold medical treatment." *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990). As noted above, however, some lower courts have relied on *Youngberg*'s professional judgment standard when reviewing the right to refuse psychotropic medication. After *Cruzan*, the continuing validity of those opinions is questionable.[5]

Thus, this Court has not yet determined the level of judicial scrutiny to be employed when persons other than incarcerated felons allege a violation of their right to refuse psychotropic medication, *see Riggins v. Nevada*, 112 S. Ct. 1810, 1815 (1992) ("we have not had occasion to develop substantive standards for judging forced administration of [antipsychotic] drugs in the trial or pre-trial settings . . . [and] we have no occasion to finally prescribe such substan-

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[5] At least one district court has rejected *Youngberg*'s professional judgment standard, based, in part, on *Cruzan*. *See Woodland v. Angus*, 820 F. Supp. 1497, 1509 n. 13 (D. Utah 1993) (state hospital policy authorizing involuntary administration of psychotropic drugs for patient's "medical interests and in accordance with prevailing standards of medical practice" held unconstitutional).

tive standards [in this case]"), and, thirteen years after *Mills*, without direction from this Court, there continues to be no consensus in the federal courts. *Sherman*, 987 F.2d at 408.

In 1981, this Court recognized the "broad significance" of the federal constitutional issues raised in *Mills*: Do involuntarily committed patients have a fundamental right to refuse psychotropic medication? If so, what competing State interests outweigh this fundamental right? *Mills*, 457 U.S. at 298. The present petition asks those same questions and more, because the impact of the present case is broader even than that of *Mills*. The Massachusetts statute at issue in *Mills* involved the rights only of involuntarily committed inpatients with mental illnesses. Illinois's Section 2-107.1, which is at issue here, involves the rights of involuntary patients as well as voluntary patients, inpatients as well as outpatients, and persons with mental illnesses as well as persons with developmental disabilities.

Moreover, Illinois's Section 2-107.1 is not a unique aberration in mental health law. At least twelve other states have statutes similar to Section 2-107.1[6]—and there is no way of knowing how many state hospitals have written policies or unwritten practices similar to the policy in *Woodland v. Angus*—all of which allow the involuntary administration of psychotropic medications to persons who

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[6] *See* Alaska Stat. Sec. 47.30.839 (Supp. 1994); Cal. Welf. & Inst. Code Sec. 5332(b) (Deering Supp. 1994); Colo. Rev. Stat. Sec. 27-10-111(4.5) (1989); Ky. Rev. Stat. Ann. Sec. 202A.196 (Michie 1991); Md. Health Gen. Code Ann. Sec. 10-708(b)(2) (1994); Minn. Stat. Ann. Sec. 253B.03(6c)(c) (1994); N.Y. Admin. Code Tit. 14, Sec. 527.8(c)(4) (1988); S.D.Codified Laws Ann. Sec. 27A-12-3.13, 3.15 (1992); Tex. Health & Safety Code Ann. Sec. 574.104 (Supp. 1994); Utah Code Ann. Sec. 62A-5-318 (1993); Va. Code Sec. 37.1-134.5 (1990 & Supp. 1994); Wis. Stat. Ann. Sec. 51.61(1)(g) (1987 & Supp. 1994).

may lack decisional capacity but who pose no threat of harm to themselves or to anyone else. Given the broad sweep of the Illinois statute, the number of similar statutes in other states, the continuing lack of consensus in the courts, and the invasiveness and potential dangerousness of psychotropic medication, the present case offers this Court the opportunity to provide needed guidance concerning an important federal issue.

II.

THE ILLINOIS SUPREME COURT'S OPINION CONFLICTS WITH *O'CONNOR*, *CRUZAN*, *HAWKS v. LAZARO*, AND *GUARDIANSHIP OF ROE*; WITHOUT A PRIOR DETERMINATION OF SUBSTITUTED JUDGMENT, THE STATE'S *PARENS PATRIAE* INTEREST CANNOT OUTWEIGH A PERSON'S RIGHT TO REFUSE PSYCHOTROPIC MEDICATION. THEREFORE, SECTION 2-107.1 VIOLATES THE DUE PROCESS CLAUSE.

The Illinois Supreme Court upheld Section 2-107.1 as a proper exercise of "the State's significant *parens patriae* interest in providing for persons who, while suffering from a serious mental illness or developmental disability, lack the capacity to make reasoned decisions concerning their need for medication." (Appendix A-15) This holding is erroneous and conflicts with opinions from this Court and lower courts which have placed limits on the State's authority to force mental health treatment onto unwilling recipients.

Recognizing limits on the State's authority to order involuntary civil commitment, for example, this Court has written:

> Persons who are mentally ill and incapable of giving informed consent to admission would not necessarily meet the [state's] statutory standard for involuntary placement . . . The involuntary placement process serves to guard against the confinement of a person who, though

> mentally ill, is harmless and can live safely outside an institution. Confinement of such a person . . . is unconstitutional. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (there is no constitutional basis for confining mentally ill persons involuntarily "if they are dangerous to no one and can live safely in freedom").

Zinermon v. Burch, 494 U.S. 113, 133-134 (1990). *See also Foucha v. Louisiana*, 112 S. Ct. 1780, 1784 (1992) (explaining *O'Connor*, 422 U.S. 563).

Similarly, the West Virginia Supreme Court struck down that state's statute which allowed the involuntary civil commitment of a person who "because of his [mental] illness or retardation lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization." *State ex rel. Hawks v. Lazaro*, 157 W. Va. 417, 202 S.E.2d 109 (1974). According to the court, the statute was invalid because the State's *parens patriae* interest does not justify involuntarily committing persons simply because they fail to understand that hospitalization may be in their best interests. *Hawks*, 157 W.Va. at 437, 202 S.E. 2d at 123. *Accord Kendall v. True*, 391 F. Supp. 413, 417 (W.D. Ky. 1975); *Doremus v. Farrell*, 407 F. Supp. 509, 514 (D. Neb. 1975); *Lynch v. Baxley*, 386 F. Supp. 378, 390 (M.D. Ala. 1974); *Bell v. Wayne County General Hospital at Eloise*, 384 F. Supp. 1085, 1095 (E.D. Mich. 1974).

These involuntary commitment cases are appropriate analogues to involuntary medication cases. *Rennie v. Klein*, 653 F.2d 836, 845 (3d Cir. 1980), *vacated*, 458 U.S. 1110 (1982), *reaffirmed on remand*, 720 F.2d 266 (3d Cir. 1983). Thus, the Massachusetts Supreme Court has held that, just as the State's *parens patriae* interest cannot justify civil commitment, the State's "*parens patriae* interest . . . does not outweigh the fundamental individual right[ ]" to refuse unwanted psychotropic medication. *In the Matter of Guardianship of Roe*, 383 Mass. 415, 449, 421 N.E.2d 40, 59

(1981). *Accord Rogers v. Commissioner of the Department of Mental Health*, 390 Mass. 489, 513, 458 N.E.2d 308, 323 (1983) ("in a non-emergency situation, no State interest is sufficiently compelling to overcome a patient's decision to refuse treatment with antipsychotic drugs"). *Cf. Washington v. Harper*, 494 U.S. 210, 227-228 (1990) (determination that prison inmate is dangerous is "precondition" to overriding his right to refuse antipsychotic drugs).

Like competent persons, persons who lack decisional capacity, but who pose no threat of danger, have the right to refuse unwanted psychotropic medication, and they retain the right to refuse even when the State asserts its *parens patriae* interest in providing for their best interests. Unlike competent persons, however, persons who lack decisional capacity cannot exercise their right to refuse for themselves. Instead, it must be exercised for them by a surrogate decision maker, and, to give their right its full measure, it must be exercised for them through the use of the substituted judgment standard.

In *Cruzan v. Director, Missouri Department of Health*, this Court approved use of the substituted judgment standard when determining whether to withdraw life-sustaining treatment from a comatose patient. There, this Court stressed the importance of determining "the wishes expressed by the patient while competent," the "deeply personal" nature of the right to refuse, and the necessity of considering only the patient's wishes, not those of her doctors, her family, or anyone else. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280-281, 285-286 (1990). Thus, this Court concluded that "Due Process requires the state to repose judgment on these matters with . . . the patient herself." *Cruzan*, 497 U.S. at 286.

Relying on *Cruzan*, a federal district court struck down as unconstitutional a hospital policy governing the involuntary

administration of psychotropic medications. *Woodland v. Angus*, 820 F. Supp. 1497 (D. Utah 1993). In *Woodland*, the plaintiff was mentally ill, an inpatient in a state hospital, incompetent to stand trial, and incapable of making decisions concerning his medical treatment, but he was not dangerous. Pursuant to its policy, the hospital sought to medicate him, over his objections, in accord with his "medical interest and . . . prevailing standards of medical practice." *Woodland*, 820 F. Supp. at 1501. The district court, however, prohibited the state from forcibly administering psychotropic medication based simply on the patient's "medical interest." The State "cannot merely assert its *parens patriae* interest and ignore plaintiff's significant liberty interest in the unwanted administration of antipsychotic medication." *Woodland*, 820 F. Supp at 1517. "While, as with Nancy's parents in *Cruzan*, the court has no doubt that defendants are concerned with plaintiff's best interests, the court holds that this decision [regarding psychotropic medication] must repose with plaintiff himself." *Woodland*, 820 F. Supp. at 1516. Therefore, the court directed the state to follow its laws requiring the appointment of a guardian and the utilization of the substituted judgment standard. *Woodland*, 820 F. Supp at 1516-1517.

Likewise, the Massachusetts Supreme Court has held that antipsychotic medication may be forcibly administered to a person who lacks decisional capacity, but who poses no immediate threat of harm, only "where a judicial substituted judgment determination indicates that the incompetent individual would, if competent, accept antipsychotic drugs." *Roe*, 383 Mass. at 453, 421 N.E.2d at 61. *Accord Rogers*, 390 Mass. at 504, 458 N.E.2d at 318.

The Illinois Supreme Court's decision in the present case conflicts with *Cruzan*, *Woodland*, and *Roe*. Although apparently stating an appreciation for the substituted judgment

standard, the Illinois Supreme Court found merely that Section 2-107.1 "permits" consideration of substituted judgment and that a patient's wishes, when competent, "will often be very relevant" to a determination of whether psychotropic medications should be administered. (Appendix A-21) Thus, by obvious implication, the court found that evidence of substituted judgment may sometimes *not* be relevant and that, while consideration of substituted judgment is permitted, such consideration is not *required*.

The Illinois Supreme Court's discretionary phraseology contrasts sharply with the mandatory language of *Cruzan*: "Due Process requires the state to repose judgment on these matters with . . . the patient herself." *Cruzan*, 497 U.S. at 286. As this Court has held, a statute which permits mere discretionary compliance with constitutional mandates is not constitutional. *Wardius v. Oregon*, 412 U.S. 470 (1973). Therefore, as construed by the Illinois Supreme Court, Section 2-107.1 is not constitutional.

Without requiring substituted judgment, the Illinois Supreme Court upheld Section 2-107.1 as a valid exercise of the State's *parens patriae* power. That holding conflicts with *O'Connor*, *Hawks*, and *Roe* and with opinions from several federal district courts. Contrary to the Illinois Supreme Court's ruling in this case, the State has no *parens patriae* authority, without a prior determination of substituted judgment, to force unwanted mental health or developmental disability services onto persons who may lack decisional capacity but who pose no threat of harm to themselves or to anyone else.

III.

THE ILLINOIS SUPREME COURT'S OPINION IS ERRONEOUS; THE CREATION OF TWO DISPARATE JUDICIAL PROCEDURES TO MAKE TREATMENT DECISIONS FOR PERSONS WHO LACK DECISIONAL CAPACITY VIOLATES THE EQUAL PROTECTION CLAUSE.

Prior to the enactment of Section 2-107.1, a person who allegedly lacked capacity to make a reasoned decision concerning his/her medical care was named the respondent in a petition for the appointment of a guardian. If the court found that the respondent was a "disabled person" and in need of a guardian, the court would appoint either a limited or a plenary guardian to make medical decisions for the ward. *See generally* 755 ILCS 5/11a-1 *et seq.* (West 1992). These medical decisions could, of course, include decisions to give or withhold informed consent for psychotropic medication. *In the Matter of Orr*, 176 Ill. App. 3d 498, 531 N.E.2d 64 (4th Dist. 1988).

In 1989, a Commission selected by the Governor of Illinois reviewed the state's mental health laws and found "numerous shortcomings in the use of guardianship proceedings" to determine when psychotropic medication should be ordered over the objections of the patient. (Appendix A-4) To create an alternative method of ordering involuntary medication, the Illinois legislature enacted Section 2-107.1. As a result, Illinois now has two separate, and unequal, procedures for dealing with persons who may lack decisional capacity to refuse psychotropic medications. The first is to file a petition for the appointment of a guardian under the guardianship statute; the second is to file a petition for court ordered medication under Section 2-107.1. The mischief of this scheme is that respondents in 2-107.1 hearings are denied certain rights which are granted to similarly situated respondents in guardianship hearings.

For example, under the guardianship statute, the petition for guardianship must be accompanied by a physician's report which details the respondent's alleged mental disability and offers an opinion as to whether the respondent is capable of making decisions. 755 ILCS 5/11a-9 (West 1992). This report serves to establish probable cause to continue the proceedings and prevents the filing of spurious petitions. In contrast, Section 2-107.1 contains no similar requirement.

Under the guardianship statute, in order to avoid conflicts of interest, a person or agency providing direct residential services to the respondent can never be appointed guardian. 755 ILCS 5/11a-5(b) (1992). In contrast, Section 2-107.1 contains no similar prohibition. Instead, if the respondent is an inpatient at a mental health or developmental disability facility, the trial court may authorize the facility's employees to involuntarily medicate the respondent. The facility's employees, however, may have conflicting loyalties to the facility and to other patients in the facility. *See Rogers v. Commissioner of the Department of Mental Health*, 390 Mass. 489, 503, 458 N.E.2d 308, 317 (1983) (". . . doctors who are attempting to treat as well as to maintain order in the hospital have interests in conflict with those of their patients who may wish to avoid medication . . . the temptation to engage in blanket prescription of such drugs to maintain order and compensate for personnel shortages may be irresistible.").

Under the guardianship statute, the guardian has no power to act on any matter covered by a power of attorney previously executed by the respondent. 755 ILCS 5/11a-17(c) (West 1992). In contrast, Section 2-107.1 provides no guarantee that a previously executed power of attorney will be honored.

Lastly, under the guardianship statute, the respondent is provided with a surrogate decision maker who oversees the ward's treatment and who exercises the ward's statutory, common law, and constitutional rights through use of the substituted judgment standard. 755 ILCS 5/11a-17(a) (West 1992); *In re Estate of Greenspan*, 137 Ill. 2d 1, 17-18, 558 N.E.2d 1194 (1990) (approving use of substituted judgment). In contrast, Section 2-107.1 provides no overseer of the patient's treatment and, as construed by the Illinois Supreme Court, sometimes permits, but does not always require, use of the substituted judgment standard.

The Illinois Supreme Court held that Section 2-107.1 does not violate equal protection, but the court reached that conclusion without citing any authority and without conducting any legal analysis. The court did not determine whether a fundamental right or a suspect class was involved, did not specify the level of scrutiny employed, and did not state the factors it considered in performing whatever level of scrutiny was employed. Moreover, the court did not even mention most of the differences between the two statutes which are described above and certainly did not explain how these differences were related to any State interest.

Not only is the court's conclusion baseless, it is erroneous. The guarantee of equal protection is that similarly situated persons will be similarly treated under the law. The court found that the guardianship statute's definition of "disabled person" "bears substantial similarity" to 2-107.1's requirement that respondents lack capacity to make a reasoned decision. (Appendix A-30) Having correctly found that respondents under the two statutes are similarly situated, however, the court then erred by upholding the statute. Respondents under 2-107.1 are not given the same rights as are similarly situated respondents under the guardianship statute. As this Court has held, persons are deprived of

equal protection if they are deprived of certain rights merely because a complaining party arbitrarily decides to seek relief under one statute rather than another. *Humphrey v. Cady,* 405 U.S. 504 (1972).

One federal court has struck down a state's statutory scheme which, like Illinois's, gave mentally ill persons who did not have guardians fewer procedural protections than it gave similarly situated mentally ill persons who did have guardians. *Vecchione v. Wohlgemuth*, 377 F. Supp. 1361 (E.D. Pa. 1974), *enforced in* 558 F.2d 150 (3d Cir. 1977). At issue were Pennsylvania statutes which required hospitals to remit the assets of patients with guardians to the guardians and to hold hearings before the assets could be used to defray the cost of care. In contrast, the same statutes authorized hospitals to seize the assets of patients without guardians and to use the assets to defray the cost of care, without providing notice and without holding hearings. The court used the deferential rational basis test but, nonetheless, held that these Pennsylvania statutes violated equal protection. *Vecchione*, 377 F. Supp. at 1368-1369.

Section 2-107.1 violates equal protection, too. Created expressly as a means of avoiding the guardianship statute, it creates an alternative, inferior method of making treatment decisions for persons who, as a result of mental illnesses or developmental disabilities, may lack decisional capacity to refuse psychotropic medication. The Illinois Supreme Court erred in upholding the constitutional validity of Section 2-107.1.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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